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Supreme Court, U.S.
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No. 03-1427

IN THE

Supreme Court of the United States

THE EUROPEAN COMMUNITY, *et al.*,

Petitioners,

v.

RJR NABISCO, INC., *et al.*,

Respondents.

DEPARTMENTS OF THE REPUBLIC OF COLOMBIA,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF REQUEST FOR GVR OR IN THE ALTERNATIVE OF GRANTING THE PETITION

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Preliminary Statement

As previously requested, this Court should grant the Petition, vacate the judgment below, and remand to the Second Circuit (GVR) for further consideration in light of this Court's decision in *Pasquantino v. United States*, No. 03-725 (April 26, 2005). Petitioners respectfully direct the Court's attention to their arguments requesting GVR treatment in prior submissions. Petition at 8, 10-11; Supplemental Brief for Petitioners at 1-4; Reply Brief at 1-2, 7-9.

GVR is entirely appropriate here. The Second Circuit affirmed the dismissal of the Petitioners' claims on the basis of unsettled law concerning the revenue rule, and now that the law on this point is settled, the Second Circuit should be permitted the opportunity to revisit its decision. This is particularly true given that this Court specifically repudiated the treaty-based analysis of the Second Circuit that led to the dismissal of Petitioners' claims in this case.

Perhaps most importantly, *Pasquantino* made it clear that use of *domestic* law to combat fraud in the United States vindicates substantial domestic interests, and is not barred by the revenue rule. The aim of the Petitioners' specific common law claims before this Court — to enjoin and eradicate organized crime that harms domestic interests and violates domestic law — has nothing to do with tax collection and is not barred by the revenue rule. GVR treatment is appropriate to allow the Court of Appeals to address these considerations, or alternatively, the Petition should be granted and the case set down for plenary consideration.

The Second Circuit Ruled On the Scope of the Revenue Rule Without The Benefit of *Pasquantino*

On January 14, 2004, the Second Circuit ruled against the interests of the European Community, its Member States, and the Departments of the Republic of Colombia, without the benefit of this Court's guidance in *Pasquantino*. App. 1a-30a. This Court has held the Petition pending the outcome of *Pasquantino*, and the case now should be remanded to the Second Circuit for consideration of *Pasquantino*.

Prior to *Pasquantino*, the scope of the revenue rule was highly uncertain. In *Attorney General of Canada v. R.J. Reynolds Tobacco Co.*, 268 F.3d 103 (2d Cir. 2001) — which provided the

basis for the decision below (App. 4a-5a, 12a-18a) — the Second Circuit stated that "the United States Supreme Court [has] not ruled on the precise scope of the rule." *Id.* at 109. Indeed, the scope of the revenue rule has always been uncertain. As Justice Thomas observed: "[t]he line the revenue rule draws between impermissible and permissible 'enforcement' of foreign revenue law has . . . always been unclear." *Pasquantino*, slip op. at 16. *Pasquantino* has clarified the law in this important area.

GVR treatment is appropriate in this case. *Pasquantino* is an intervening event providing an authoritative ruling on the scope of the revenue rule. *Pasquantino* laid out the analytical framework for addressing the potential application of the revenue rule to a particular claim. *Pasquantino* provided much needed clarification and guidance for the courts. On this basis alone, the case should be remanded and the Second Circuit should be allowed to reconsider its ruling below in light of *Pasquantino*. Indeed, this is the classic situation favoring GVR treatment. *See, e.g., Stutson v. United States*, 516 U.S. 163, 180-181 (1996).

Pasquantino Addressed and Rejected The Second Circuit's Approach

GVR treatment is appropriate because *Pasquantino* directly undermined the decision below.

The Second Circuit barred Petitioners' common law claims seeking to *enjoin* cross-border smuggling schemes, carried out by these defendants on United States soil. In reaching this conclusion, the Second Circuit's pivotal rationale was that, by means of the United States tax treaties, the United States has "clearly expressed [the] intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *Attorney General of Canada*, 268 F.3d at 119; App. 14a. Because the tax treaties did not specifically provide for access to the courts on smuggling claims, the Petitioners were denied access to the courts, under the Second Circuit's approach.

Pasquantino squarely rejects this approach. This Court specifically addressed and rejected the treaty-based rationale of *Attorney General of Canada* and held that: "U.S. tax treaties" do

not limit the reach of domestic law, such as the wire fraud statute. *Pasquantino*, slip op. at 7 (citing *Attorney General of Canada*).

The Second Circuit's treaty-based rationale was also considered by the dissent. Part I of Justice Ginsburg's dissent (joined by Justice Breyer), specifically embraced the Second Circuit's rationale, stating: "Congress has actively indicated, through both domestic legislation and treaties, that it intends 'strictly to limit the parameters of any assistance given' to foreign nations." *Pasquantino*, slip op. at 8 (Ginsburg, J., dissenting) (quoting *Attorney General of Canada*). The majority, however, specifically rejected this view. *Pasquantino*, slip op. at 7 (citing *Attorney General of Canada*).

The Second Circuit's treaty-based rationale that led to the dismissal of Petitioners' claims was considered, debated and rejected by this Court, and remand is appropriate to allow the Second Circuit to address the implications of *Pasquantino*.

The Revenue Rule Does Not Bar The Claims Before This Court

The Second Circuit's application of the revenue rule to bar the common law, equitable claims before this Court is irreconcilable with *Pasquantino*, and GVR treatment is therefore appropriate.

Pasquantino narrowed the revenue rule, as it had been reformulated and extended by the Second Circuit. The revenue rule, at its core, applies to claims seeking "the collection of tax obligations of foreign nations." *Pasquantino*, slip op. at 10. *See also Pasquantino*, slip op. at 10 ("collection of foreign tax claims"); 10 (enforcement of a "'tax judgment'") (citation omitted); 11 ("a suit that recovers a foreign tax liability, like a suit to enforce a judgment"). The revenue rule applies where "'the whole object of the suit is to collect tax for a foreign revenue.'" *Id.* at 13 (citation omitted). The revenue rule does not apply to an action, predicated on *domestic* law (like the wire fraud statute), that addresses *domestic* conduct, in order to vindicate a substantial *domestic* interest in combating fraud, separate and apart from foreign tax matters. *Pasquantino*, slip op. at 11, 13. This Court held that "the revenue rule never proscribed all enforcement of foreign revenue law." *Pasquantino*, slip op. at 15.

Under *Pasquantino*, the Second Circuit's decision to bar the common law claims for equitable relief before this Court cannot

stand. The Question Presented in the Petition is:

> Whether the Court of Appeals erred in extending the "revenue rule" to bar claims brought under U.S. domestic law seeking equitable relief to enjoin and remedy smuggling schemes based in the United States.

Petition at i.

The Petition is limited to very specific common law claims for equitable relief under domestic law, and does not raise other claims. Petitioners assert common law tort claims, such as negligence, fraud, unjust enrichment and public nuisance, all of which seek *injunctive* relief to abate the damaging conduct that violates domestic law. The claim for an injunction is predicated on U.S. domestic common law, not foreign tax law. This claim seeks to *enjoin* domestic wrongdoing, not recover foreign taxes. This claim vindicates substantial domestic interests in enjoining wrongdoing that fuels organized crime – interests that are independent of foreign tax collection. It absolutely cannot be said that this claim seeks, in whole or in part, the recovery of foreign taxes. In fact, it seeks injunctive relief, not money. The revenue rule, as articulated by this Court in *Pasquantino*, does not bar such claims, and the Second Circuit should be permitted the opportunity to reassess its decision to bar Petitioners' claims in light of *Pasquantino*.

The Petitioners' claim for injunctive relief does not constitute a direct or indirect effort to collect foreign taxes or enforce foreign tax law. This Court has made it plain, consistent with the Irish court in *Buchanan*, that the revenue rule bars a claim in which the "'whole object of the suit is to collect tax for a foreign revenue.'" *Pasquantino*, slip op. at 13 (citation omitted). Petitioners' claim for an injunction under domestic law obviously is not such a suit. "[T]he revenue rule never proscribed all enforcement of foreign revenue law." *Pasquantino*, slip op. at 15. Even if Petitioners' injunction claim were thought to "enforce" foreign revenue law in some "attenuated" or indirect sense, it would be permissible under *Pasquantino*. *Pasquantino*, slip op. at 15 ("attenuated" enforcement of Canadian tax law does not "contravene the revenue rule"). It should be left to the Court of Appeals to decide, on the basis of *Pasquantino* and an appropriate record, whether the

Petitioners' claims still fall within the purview of the revenue rule.

In their Supplemental Brief, the Respondents misrepresent the specific claim before this Court on this Petition in an effort to prevent GVR treatment. This Court stated: "[w]e express no view on the related question whether a foreign government, based on wire fraud or mail fraud predicate offenses, may bring a civil action under the Racketeer Influenced and Corrupt Organizations Act for a scheme to defraud it of taxes." *Pasquantino*, slip op. at 3 n.1 (citations omitted). Respondents are incorrect when they assert that the issue identified in the Court's footnote is the "precise question presented by this case." Respondents' Supp. Br. at 1. Respondents simply ignore the Question Presented in the Petition. This Court should not accept Respondents' invitation to casually aggregate all of Petitioners' claims, re-characterize them as RICO claims for lost taxes, and summarily bar the claims under the revenue rule.

Petitioners' main focus on the Petition is whether the revenue rule bars a claim under United States *common* law, to *enjoin* fraudulent conduct within the United States. The Court's footnote does not render *Pasquantino* inapplicable to this case.

Finally, the Respondents claim that a civil action brought by a foreign government lacks "safeguards" to prevent international friction. Respondents' Supplemental Brief at 3-4. This is plainly incorrect. A claim for injunctive relief under domestic law does not ordinarily threaten such friction. Nonetheless, the United States may appear in "any" court to protect the interests of the United States (28 U.S.C. 517), and may file a Statement of Interest or an *amicus curiae* brief to protect such interests. A court may also invite *amicus* participation by the United States. The United States has ample safeguards, in the civil context, to protect against international friction, if such friction arises.

Conclusion

The Petition should be granted, the judgment below should be vacated, and the case should be remanded to allow the Court of Appeals, in the first instance, to revisit its decision in light of *Pasquantino*. Alternatively, the Petition should be granted, and the case should be accorded plenary treatment.

Respectfully submitted,

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